



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MPA/160435

PRELIMINARY RECITALS

Pursuant to a petition filed September 04, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Division of Health Care Access and Accountability in regard to Medical Assistance, a hearing was held on October 28, 2014, at Milwaukee, Wisconsin.

The issue for determination is whether the Department correctly denied Petitioner's July 16, 2014 Medical Prior Authorization (MPA) request for lap gastric bypass surgery.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney Anthony J. [REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Dr. Lora Wiggins

Division of Health Care Access and Accountability
1 West Wilson Street, Room 272
P.O. Box 309
Madison, WI 53707-0309

ADMINISTRATIVE LAW JUDGE:

Corinne Balter

Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.

2. Petitioner is a 52 year old woman with a Body Mass Index of 54 kg/ m2. She is 5'6" tall and weighs 344 pounds.
3. On July 16, 2014 Petitioner's provider submitted a prior authorization for lap gastric bypass surgery.
4. On August 12, 2014 the Department reviewed Petitioner's request, and denied it because Petitioner does not have at least one high-risk, life limiting comorbid medical condition capable of producing a significant decrease in health status that is demonstrated to be unresponsive to treatment.
5. Petitioner has sleep apnea, which is controlled through a CPAP machine. Petitioner also has high blood pressure, which is controlled through medication when Petitioner is compliant with the medication. However, even if her blood pressure is not currently controlled through medication, there are additional medications available to Petitioner.
6. Petitioner has tried many diets in the past including weight watchers, Curves, physician supervised weight loss, counting calories, and diets of her own design. Petitioner reported that at one point she had lost 120 pounds, however, she then lost interest in maintaining the lower weight, and reverted back to her old habits causing her to gain back the weight lost and more.
7. Petitioner desperately wants to have lap gastric bypass surgery. Petitioner testified that it is her belief that she needs this surgery. She was not concerned with death being a risk of the surgery as she believes that not having the surgery will cause to die. The medical evidence does not support Petitioner's belief.

DISCUSSION

Wis. Stat., §49.46(2)(f) provides as follows concerning MA benefits: "Benefits under this subsection may not include payment for gastric bypass surgery or gastric stapling surgery unless it is performed because of a medical emergency."

The criteria for approval of a gastric bypass, as of September 1, 2011, are as follows:

The approval criteria for PA requests for covered bariatric surgery procedures include ... the following:

☐ The member has a body mass index greater than 35 with at least one documented high-risk, life-limiting comorbid medical conditions capable of producing a significant decrease in health status that are demonstrated to be unresponsive to appropriate treatment. There is evidence that significant weight loss can substantially improve the following comorbid conditions:

- Sleep apnea.
- Poorly controlled Diabetes Mellitus while compliant with appropriate medication regimen.
- Poorly controlled hypertension while compliant with appropriate medication regimen.
- Obesity-related cardiomyopathy.

ForwardHealth Update, No. 2011-44, effective September 1, 2011. There also must be documented prior attempts to lose weight, three months participation in a weight loss program, and medical and psychological evaluations to determine if the person is an appropriate candidate for such surgery. The use of the Department's periodic Updates to set MA coverage guidelines is approved by law. See, Wis. Admin. Code § DHS 108.02(4). The criteria at issue here were drafted because of the mandate that gastric bypass is limited to medical emergencies. Wis. Admin. Code, §DHS 107.06(4)(h).

Petitioner has not submitted sufficient evidence showing that she has one documented high-risk, life-limiting comorbid medical conditions capable of producing a significant decrease in health status that is demonstrated to be unresponsive to appropriate treatment. Although it is undisputed that Petitioner suffers from Hypertension, Petitioner's hypertension is controlled. Even if her hypertension is not controlled, Petitioner still failed to show that this condition is unresponsive to appropriate treatment. Petitioner also has sleep apnea, which is controlled by a CPAP machine.

Petitioner maintains that her hypertension is not well controlled with medication. Petitioner is currently taking two medications for her high blood pressure. She submitted a list of high blood pressure readings from 2011 through July 26, 2013. She submitted an additional reading after her chart. This is a total of 15 high blood pressure readings over a three period. This list of dates where Petitioner's blood pressure was elevated is not particularly useful. This list is not an exhaustive list of Petitioner's blood pressure readings during that time period. Petitioner has essentially cherry picked the dates when she has had high blood pressure readings. Petitioner's list fails to include dates where her blood pressure readings were significantly lower. For example, one of her more recent readings was 138/88. In addition, Petitioner's medications were changed after some of these high readings. After the medication was changed, her blood pressure improved until very recently while this appeal was pending.

Dr. Wiggins also points out that Petitioner is only taking two medications for her blood pressure. There is a third medication available that has not yet been prescribed to Petitioner. The medical records show that Petitioner is not always compliant with her blood pressure medications. If the issue is that Petitioner's blood pressure is not currently controlled with the medications she is taking, then her primary care doctor could prescribe a third medications. The primary care physician has not done this, which demonstrates that the issue may really be a compliance issue, rather than the medications not working for this Petitioner. Nonetheless even if her blood pressure cannot be controlled with the two medications she is on, she still has not yet tried the third medication, and therefore cannot show that her high blood pressure is unresponsive to appropriate treatment as she has not yet tried all of the appropriate treatment available for hypertension.

Petitioner testified that she has problems with the mask for her CPAP machine. She testified that she is Claustrophobic and cannot sleep with the mask on at night. I find Petitioner's testimony on this point to be self-serving. Petitioner desperately wants to have this surgery. The Department sent Petitioner a letter stating that they were not approving this surgery in part because her sleep apnea is controlled with a CPAP machine. Petitioner then testifies that she is having issues with the mask for her CPAP machine. There is no evidence in the medical record to show that this Petitioner has a specific medical condition that would cause a mask on the CPAP machine not to work. In fact the medical documentation submitted by Petitioner shows the opposite. Multiple physical evaluations of this Petitioner show that her head, neck, eyes, ears, mouth and throat are all normal.

This record does not establish *documented* prior attempts to lose weight or three months participation in a weight loss program. Petitioner states that she has attempted to lose weight in the past and even has been very successful in her weight loss at different points. However, in order to qualify for the surgery under Medicaid Petitioner must provide documentation of this, and must have three months participation in a weight loss program. Petitioner does not provide this documentation, only assertions that she has tried to lose weight and has lost weight in the past.

It is important to note that although Petitioner does not meet the Medicaid standard for gastric bypass surgery, she qualifies under the Medicare standard. The issue for this appeal is whether Petitioner meets the Medicaid guidelines for gastric bypass surgery. However, it is my understanding that regardless of my decision, Medicaid's policy is to pay all secondary claims from Medicare without adjudicating them. These are referred to as crossover claims. Therefore, if Medicare pays a claim for a Medicaid member, the part that Medicare does not pay will automatically be paid, regardless of whether Medicaid would pay

as the primary insurance. Nonetheless, Petitioner still does not meet the Medicaid standard for gastric bypass surgery.

CONCLUSIONS OF LAW

The Department correctly denied Petitioner's July 16, 2014 Medical Prior Authorization (MPA) request for lap gastric bypass surgery.

THEREFORE, it is

ORDERED

That the Petition is dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

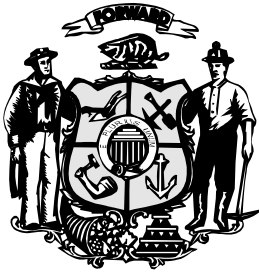
The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 19th day of November, 2014

\s

Corinne Balter

Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on November 19, 2014.

Division of Health Care Access and Accountability
Attorney Anthony [REDACTED]